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BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

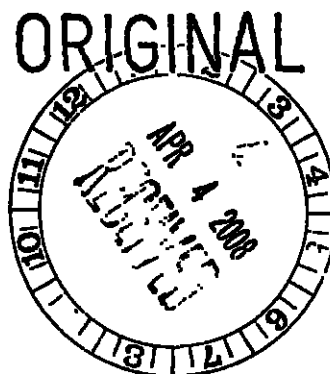
v.)

CSX TRANSPORTATION, INC.)

Defendant)

**PUBLIC
VERSION**

Docket No. NOR 42101



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REBUTTAL EVIDENCE OF CSX TRANSPORTATION, INC.

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY ..	2
I. DUPONT HAS NOT DEMONSTRATED THAT CSXT HAS MARKET DOMINANCE OVER THE ISSUE MOVEMENT..	5
II. CSXT'S FINAL COMPARISON GROUPS ARE SUPERIOR TO THOSE PROFFERED BY DUPONT.	6
A. Whether a Movement is Covered by a Fuel Surcharge is a Relevant Comparison Criterion.....	8
B. CSXT's Final Mileage Criteria Are Superior Because They Use Actual Mileage Rather than an Estimate and Avoid Distorting Rounding.	17
C. DuPont's Untimely Density Analysis Does Not Support Its Comparison Group. ..	21
D. Other Factors.....	23
III THE BOARD SHOULD ACCEPT CSXT'S PROPOSED ADJUSTMENTS TO THE BENCHMARKS, AND REJECT THE RESTRUCTURING OF THE BENCHMARKS PROPOSED BY DUPONT.	24
A. RSAM Tax Adjustment ..	24
B. The Board Should Reject the Retroactive Changes to the RSAM Proposed by DuPont ..	28
CONCLUSION.	31

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INTRODUCTION AND SUMMARY

CSXT respectfully submits this Rebuttal Evidence in further support of its positions in this case. At the outset, CSXT emphasizes a few important points. *First*, DuPont's Complaint in this case constitutes a misuse of the Board's procedures for "small rate disputes." *Simplified Standards for Rail Rate Cases*, STB Ex Parte 646 (Sub-No. 1), at 22 (Sept. 5, 2007) ("*Simplified Standards*"). DuPont—a Fortune 100 company with over \$27 billion in annual revenue—has a large commercial dispute with CSX Transportation, Inc. ("CSXT") arising from the expiration of the parties' Master Contract, which governed all of DuPont's traffic on CSXT over hundreds of lanes. Apparently seeking to obtain negotiating leverage in this broader commercial disagreement, DuPont cherry-picked seven lanes of traffic for challenge in this and two other allegedly "small" cases under the Three Benchmark approach set forth in *Simplified Standards*. DuPont's "improper attempt[] to disaggregate a large claim into a number of smaller claims" violates the letter and the spirit of the Three Benchmark process, and the Board could dismiss DuPont's challenge on that ground alone. *E I DuPont de Nemours & Co v CSX*

Transp. Inc., STB Docket Nos. 42099 *et al.*, Decision at 4 (Jan. 22, 2008) (hereafter decisions in these cases will be cited by docket number and date).¹

Second. if the Board does consider these cases, the Board should reject DuPont's challenges. DuPont's Complaint should be dismissed for lack of jurisdiction, because it has not carried its burden of demonstrating that CSXT is market dominant over the issue movement.

This clear evidence of effective truck competition definitively disproves DuPont's claim that CSXT is market dominant.

Third, if the Board considers DuPont's Three Benchmark challenge on the merits, it should find the challenged rate does not exceed a maximum reasonable level. As CSXT has demonstrated, its proffered comparison group is superior to that proffered by DuPont. DuPont has included movements without fuel surcharges in its comparison group, even though the application of a fuel surcharge is driven by market factors that make movements with fuel surcharges more comparable to the issue movement than movements without fuel surcharges. DuPont's Reply Evidence reveals that one of its motivations for ignoring this factor is its belief – which this case shows is incorrect – that fuel surcharge movements necessarily have “higher R/VC ratios” than non-fuel surcharge movements. *See* DuPont Reply at 17-18. This is an improper basis for selecting comparable movements. DuPont's result-driven approach should be rejected, and the Board should adopt CSXT's comparison group.

¹ CSXT also reiterates and preserves its previously-stated objections to the Three Benchmark approach itself and the rules and limitations the Board adopted to govern cases brought under that approach. CSXT incorporates its prior discussion of its objections herein. *See* CSXT Opening at 12-18

Fourth. it is essential that the Board adjust revenues and costs of comparison traffic to 2007 levels. Some of the Waybill Sample movements in the parties' comparison groups date from 2002, and the most recent date from 2005. It makes no sense to use historical rates from three to six years ago as a basis to determine in 2008 the reasonableness of a rate established in 2007, let alone potentially lock in a rate for five years into the future—particularly in light of the sea change in rail transportation markets over recent years. If there is to be any validity in determining the reasonableness of rates by comparing them to rates for other movements, the Board must ensure that it is not comparing apples and oranges. That is exactly what it would do if it does not update the revenues and costs of comparison group traffic to 2007 levels.

Finally, in the unlikely event that the Board were to find CSXT's rate unreasonable, the Board should allocate any rate prescription evenly over the five-year time period for rate prescriptions. DuPont is entitled to a maximum relief of \$1 million in this case over the next five years. See Docket Nos. 42099 *et al* , Decision at 3 (Jan. 22, 2008); see also *Simplified Standards* at 28. The *Simplified Standards* do not clearly indicate how any rate relief should be allocated over the five-year prescription period. It seems reasonable, however, that the Board would intend that available relief (after deduction of any reparations) be spread evenly over the five-year period. In the absence of such a requirement, a large shipper like DuPont with multiple source and transportation options would have incentive to exhaust the maximum available relief as quickly as possible and then switch its traffic to a different origin, source, or transportation provider. Such opportunistic tactics are not consistent with the purpose of the Board's relief limits, which are to limit the application of the rough and imprecise Three

Benchmark approach to truly small cases. For this reason, the Board should ensure that any rate relief it might award in this case is allocated evenly over the five-year rate prescription period.

I. DUPONT HAS NOT DEMONSTRATED THAT CSXT HAS MARKET DOMINANCE OVER THE ISSUE MOVEMENT.

DuPont has failed to demonstrate that CSXT has market dominance over the issue movement. As previously demonstrated, CSXT's rail transportation service faces vigorous modal competition in the form of a trucking alternative,

See CSXT Reply at 6

DuPont has failed to proffer evidence to show that trucks do not provide a viable, competitive transportation alternative for the issue movement, much less that CSXT has "market dominance" over that movement. Thus, DuPont has failed to meet its burden of proving market dominance. *Government of the Territory of Guam v. Sea-Land Serv., Inc.*, STB W.C.C 101, slip op at 6 (Feb. 2, 2007) (complainant has the burden of proof to show that the defendant has market dominance).² Accordingly, the Board should dismiss DuPont's complaint for lack of jurisdiction.

² *See Duke Energy Corp. v CSX Transp., Inc.*, S.T.B. Docket No. 42070, at 4 (Mar. 21, 2003) (any attempt to introduce evidence on rebuttal that should have been presented in a party's case-in-chief, is untimely and shall not be considered by the Board).

II. CSXT'S FINAL COMPARISON GROUPS ARE SUPERIOR TO THOSE PROFFERED BY DUPONT.

On Reply, each of the parties accepted some of the selection criteria proffered by the other party. As a result, the parties' final comparison groups are more similar to one another than their initial comparison groups. While there remain differences between the parties' comparison groups, those differences are primarily attributable to the use and application of a small number of comparability factors. *First*, because the issue traffic is subject to a fuel surcharge, CSXT included in its comparison group only movements that are also subject to CSXT's fuel surcharge. DuPont contends that, despite the obvious difference between movements with and without fuel surcharges, it did not confine its comparison groups to movements subject to a fuel surcharge for two primary reasons. Neither of those reasons can withstand scrutiny. DuPont initially claims, disingenuously, that it cannot determine whether the amounts reported in the Waybill Samples' "Miscellaneous Charges" field represent fuel surcharges. As the Board and DuPont both know, however, CSXT reports fuel surcharges in that field. Moreover, as a straightforward comparison of the applicable fuel surcharge (which is readily determined using the fuel surcharge mechanism described in CSXT's public website and information from the Waybill Sample) and the Waybill Sample records for the comparison group illustrates, CSXT reported only fuel surcharge revenue in the Miscellaneous Revenue field. As CSXT demonstrates, the amount reported in the Miscellaneous Revenue field matches the applicable fuel surcharge for every single movement in CSXT's comparison group in this case. DuPont's second argument consists of a series of red herrings, all based upon the illogical notion that selection of comparable movements should be based on whether, how, and to what extent CSXT's fuel surcharge program "recovers" its overall fuel cost. While this complex and multifaceted question may be of interest in other contexts, it has no relevance to the selection of

movements that are comparable to the issue traffic in a Three Benchmark case. DuPont thus offers no meaningful reason for its failure to confine its comparison groups to movements that, like the issue traffic, are subject to a fuel surcharge.

Second, while CSXT uses the actual miles traveled by the issue traffic for purposes of applying the parties' common mileage band criteria, DuPont rejects the use of actual mileage in favor of a rough and imprecise estimate that distorts the actual length of the issue movements and undermines the accurate application of the mileage factor. At the outset of the case, CSXT provided to DuPont the actual miles traveled by the issue movement, identifying the actual route followed by the movement in the real world. Nonetheless, in both its Opening and Reply submissions, DuPont eschewed the actual miles and instead used an estimate of the length of those movements generated by PC Rail. For the nitrobenzene issue traffic subject to this complaint, the PC Rail miles used by DuPont are different from the actual miles used by CSXT. DuPont compounds that error by rounding all of the estimated mileages to the nearest 50 miles. Because the mileage band itself is only 150 miles, the potential error introduced by rounding to the nearest 50 miles is manifest. However, DuPont has offered no explanation for the unnecessary and distorting extra step of rounding its already inaccurate mileage estimates.³ CSXT made a significant concession by adopting the narrow mileage band advocated by DuPont. If that criterion is to be applied in a meaningful manner, it is essential that the baseline for its application – the length of the issue movements – be calculated using actual miles without rounding.

³ As demonstrated below, DuPont's rounding device has a greater distorting effect in this case than in either of the two pending companion cases. *See infra* at § II.3 b

A. Whether a Movement is Covered by a Fuel Surcharge is a Relevant Comparison Criterion.⁴

The issue movement has a fuel surcharge. CSX's final comparison group therefore includes only movements to which a fuel surcharge applies. DuPont, however, ignores this important comparability factor and has included a movement in its final comparison group to which no fuel surcharge applies. DuPont's decision to ignore this factor renders its comparison group less comparable to the issue movement, because the presence or absence of a fuel surcharge is a market-based factor that effectively distinguishes between movements that are subject to different market forces and conditions. *See generally* Karn V.S., Ex. 2. DuPont attempts to cloud the issue by making various irrelevant claims about whether and to what extent CSXT's fuel surcharge "recovers" its overall cost of fuel. In this Three Benchmark proceeding, such claims are a diversion that confuses the simple question at issue: when the issue traffic is subject to a fuel surcharge, are movements that also have such fuel surcharges more comparable to the issue traffic than movements that lack fuel surcharges? The clear answer is yes. CSXT's use of a fuel surcharge criterion makes its comparison group more comparable to the issue traffic than DuPont's group, which fails to take into account this distinguishing characteristic of the issue movement.

1. Applicable Fuel Surcharges Are Reported in the Miscellaneous Charges Field of the 2002-2005 Waybill Samples, and DuPont Has Long Had Ample Evidence to Confirm This Fact.

DuPont initially claims that it does not know, and apparently is unable to determine, whether the Miscellaneous Charges field in the CSXT Waybill Samples reports fuel

⁴ The fuel surcharge criterion accounts for less of the difference between the parties' final comparison groups in this case than in the other two pending companion cases (*DuPont v. CSXT*, STB Docket Nos. 42099 & 42100). This does not change the fact that DuPont's failure to apply a fuel surcharge criterion makes the comparison group it selected less comparable to the issue traffic than the group selected by CSXT.

surcharges, or whether other charges might also be reported in that field. DuPont Reply at 18.

As the Board is well aware, CSXT reports fuel surcharge revenue in the Miscellaneous Charges field.⁵ Moreover, when, at the request of DuPont's consultants, the parties met with Board staff for a technical conference to discuss Waybill Sample fields and the calculation of the RSAM, the parties discussed the very Miscellaneous Charges field that DuPont now claims it does not understand and cannot use to verify that the movements CSXT selected for its comparison groups were covered by its fuel surcharge. Since the time DuPont received the Waybill Samples furnished by the Board (well before it filed its opening evidence), DuPont has had all of the information it needed to verify that the Miscellaneous Charges field reports CSXT's fuel surcharge. *See Fisher V.S., Ex. 1 at 7.*

DuPont cannot seriously claim that CSXT's selection criterion is inappropriate because its witness cannot confirm the "link" between fuel surcharge and the miscellaneous charges reported in the Waybill Samples. The Board made the Waybill Samples available to the parties on November 9, 2007 (for years 2001-2004) and on December 19, 2007 (for 2005), the latter being six weeks before parties filed their opening evidence.

⁵ *See Rate Guidelines – Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No.2) (Dec 20, 2007) In the December 11, 2007 RSAM decision, the Board explained that it was including the miscellaneous charges field "in order to capture fuel surcharges for those railroads that do not include fuel surcharges in t

Contrary to DuPont's claim, public information and evidence in the record at the time that the parties filed their opening evidence were more than adequate to support CSXT's use of the Miscellaneous Charges field to identify movements that were subject to a fuel surcharge and verify that the fuel charge amount was accurately reported. Thus, contrary to DuPont's Reply assertion, CSXT has presented ample evidence to show that CSXT fuel surcharge revenue is reported in the Miscellaneous Charges field. To demonstrate this fact, CSXT Witness Fisher calculated the fuel surcharges for the comparison group movements according to the contemporaneous CSXT fuel surcharge mechanism, and then compared them with the revenues reported in the Miscellaneous Charges field of the corresponding Waybill Samples. *See Fisher V.S., Ex. 1 at ¶ 5.* For every single movement in CSXT's comparison group – approximately 40 different records – the fuel surcharge amount and the amount reported in the Miscellaneous Revenues field matched. This confirms that CSXT reported fuel surcharge revenue, and only fuel surcharge revenue, in the Miscellaneous Revenues field for the movements in CSXT's comparison group in this case. *See Fisher V.S., Ex. 1 at ¶ 7.* As demonstrated above, DuPont could have easily verified this fact using data available to it in this

case. CSXT properly and accurately identified movements subject to a fuel surcharge using the Waybill Sample's Miscellaneous Charges field.

2. *Market Factors and Commercial Considerations Determine Whether a Movement is Subject to a Fuel Surcharge*

Whether a movement has a fuel surcharge is a function of the market dynamics of that movement. As fuel costs skyrocketed in recent years, CSXT responded by working to apply a fuel surcharge mechanism to as much traffic as possible. *See* CSXT Opening at 16; CSXT Reply 17; *see also* Karn V.S., Ex. 2 at ¶ 2. But while CSXT was able to apply a fuel surcharge to its common carrier traffic immediately and promptly began to negotiate fuel surcharges for new contracts, it was not able to apply fuel surcharges to traffic moving under existing contracts. *See* CSXT Opening at 16; *see also* Karn V.S., Ex. 2 at ¶ 2. As CSXT explained in Ex Parte No. 661,

A very large proportion of CSX's carloads are carried pursuant to contracts with its customers—not pursuant to common carrier rates. When [CSXT's amended fuel surcharge] went into effect on June 1, 2003, CSXT could not apply it to many existing contracts. Since June 1, 2003, however, CSXT has sought to incorporate the fuel surcharge into new contracts and renewed contracts. . . .

Written Statement of CSXT at 9, Ex Parte 661, *Railroad Fuel Surcharges* (Apr. 27, 2006).

As those legacy contracts—many of which had relatively long terms—have gradually expired, CSXT has negotiated replacement agreements that include fuel surcharge provisions. *See* CSXT Opening at 18; Karn V.S., Ex. 2 at ¶ 2.

Because the application of a fuel surcharge is a significant, market-based factor that distinguishes movements like the issue traffic from movements without a fuel surcharge, it is an appropriate comparison factor.

DuPont's true motivation for refusing to apply this factor is betrayed by the testimony of its consultant, who argues against the application of this criterion by complaining that movements covered by a fuel surcharge "have higher R/VC ratios" than non-fuel surcharge movements. Crowley Reply V.S. at 18. Mr. Crowley's telling comment demonstrates DuPont's result-oriented approach to the selection of comparable movements, in which the deciding factor in determining whether to apply a comparability criterion is its effect on the comparison group's R/VC ratio, and, ultimately, on the final rate reasonableness analysis. Under the result-driven approach suggested by DuPont's primary witness, the fact that application of a particular comparability factor may raise the comparison group's R/VC is sufficient reason to reject or ignore that factor, even such obvious comparability factors as the application of a fuel surcharge. The purpose and intention of the Three Benchmark approach, of course, is to identify traffic that is reasonably comparable to the issue traffic first, and then to derive from that traffic group benchmarks that may be used to assess the reasonableness of the challenged rates, *not* to start by

identifying movements that generate the results most favorable to one party and then to label them “comparable”⁹

3 *DuPont’s Substantive Criticisms of CSXT’s Use of Fuel Surcharges as a Comparison Factor Are Irrelevant and Unsupported*

DuPont’s objections to using fuel surcharges as a comparability factor are a study in misdirection, and entirely beside the point. DuPont’s primary argument is that CSXT might have “recovered” its fuel costs for traffic without a fuel surcharge in some other way. *See* DuPont Reply at 18-19.¹⁰ But what is at issue here is not cost recovery, it is comparability. As explained, certain CSXT movements do not have a fuel surcharge due to market factors and conditions that distinguish them from movements like the issue traffic, which are subject to fuel surcharges. *See* CSXT Reply at 18; *Karn V.S.*, Ex 2 at ¶¶ 3, 5. That market distinction is the reason that non-fuel-surcharge movements are less comparable to the issue traffic than movements with fuel surcharges. Whether or not CSXT recovered its fuel costs – or any other

¹⁰ DuPont’s point of departure for its entire series of arguments against this comparison factor is its contention that CSXT excluded movements without fuel surcharges from its comparison groups based upon “the unsupported assumption that this indicates that fuel costs were not recovered.” *See* DuPont Reply at 18. CSXT did not make this argument or “assumption.” *See* CSXT Reply at 17-18 (discussion of fuel surcharge comparability factor). DuPont does not – because it cannot – provide any cite to CSXT’s evidence as the basis for this strawman claim, which is the essential premise for all of DuPont’s substantive arguments against using the application of a fuel surcharge as a comparison factor.

specific component of its costs of providing rail transportation service – on any particular movement(s) is irrelevant to whether that movement is comparable to the issue movements.¹¹

DuPont's claim that the "market-based decision" to apply a fuel surcharge does not bear on comparability is misguided in several ways. DuPont Reply at 19. First, the idea that CSXT unilaterally "decided" what traffic would have fuel surcharges is incorrect—CSXT plainly could not "decide" to apply a fuel surcharge to pricing agreements that did not allow it. More fundamentally, the identification of traffic with similar "market-based" characteristics is the goal and intention of developing a comparable group, not a basis for criticizing that group. The comparability factors the Board identified in *Simplified Standards*—"length of movement, commodity type, traffic densities of the likely routes involved, and demand elasticity"—are *market* characteristics that affect railroads' price-setting decisions. See *Simplified Standards* at 17. Under the demand-based differential pricing approach that is the cornerstone of modern railroad economics and rail rate regulation, carriers are expected to base their prices on "the market demand which they observe[]" *Coal Rate Guidelines*, 1 I.C.C.2d 520, 527 (1985). The elasticity of demand and other commercial conditions and market factors that affect whether traffic was subject to a fuel surcharge are precisely what makes traffic more comparable than not.

The final variation on DuPont's cost-recovery based theme is the claim that, for movements not having a fuel surcharge, application of the RCAF index "would have captured

¹¹ Similarly irrelevant to the question of comparability is DuPont's unsupported allegation that CSXT "overrecovered" its fuel costs for movements covered by a fuel surcharge. DuPont Reply at 19. There is no evidence that CSXT was "overrecovering" fuel costs for any particular movement in the waybill sample. Regardless, CSXT's revenue for any particular movement is not a relevant comparability factor. DuPont's witness' contrary suggestion, that the relative R/VC ratios of fuel surcharge movements are somehow relevant to determining comparability, is wrong. See DuPont Reply. Crowley V.S. at 13. Indeed, accepting Mr. Crowley's suggestion that the selection of comparable movements be guided by their R/VC ratios would make the Three Benchmark exercise circular, arbitrary and meaningless.

the increase in CSXT's fuel costs."¹² DuPont Reply at 19. Even if DuPont's fuel cost recovery arguments and allegations were relevant to the present comparability question—which they are not—DuPont's predicate assumptions are sheer speculation

It is impossible to determine whether or to what extent any particular movement was subject to an alternative fuel cost recovery mechanism without relying on non-public data. Under the Board's governing rulings, parties may not rely upon non-public data for comparison group selection. *See* Decision, STB Docket Nos. 42099 *et al.*, at 2-4 (Jan. 31, 2008); Decision, STB Docket Nos. 42099 *et al.*, at 203 (Jan. 15, 2008). It cannot be determined, based on public information, whether, and to what extent, any particular movement that is not covered by CSXT's fuel surcharge was subject to adjustment by an index or hybrid index that included a fuel component. Thus, inclusion of only traffic with a fuel surcharge is more likely to reflect traffic having similar market characteristics to the issue traffic than the indiscriminate approach of not screening for a fuel surcharge.¹³

¹² DuPont does not specify which RCAF index it is relying upon for this speculative assertion. The comparison that witness Crowley makes between the fuel component of an unspecified version of the RCAF and the EIA diesel fuel index is also of little-to-no value, because it considers neither the relative weight the RCAF assigns to fuel costs nor CSXT's actual cost experience in the relevant period.

¹³ In the same vein, DuPont's argument that "the fuel component of the RCAF" increased at a different rate than the U.S. Energy Information Administration U.S. No. 2 Diesel Price index—even if it were correct—is not relevant. DuPont Reply at 18-19. Again, the question here is

And, even if the parties were allowed to use non-public evidence to identify which of the several available escalators and indices applied to which movements, DuPont still would have provided no evidence to show that any one of those indices under- or over-recovered the fuel costs of a particular movement.¹⁴

Despite DuPont's attempt to obscure the issue by detouring through irrelevant and unsupported speculation about relative cost recovery, the relevant question remains whether the application of a fuel surcharge is an appropriate comparison criterion. There is little real dispute that, holding other factors constant, the issue movement (which has a fuel surcharge) is more comparable to movements with fuel surcharges than to movements without fuel surcharges. DuPont's failure to account for this factor is both significant, and a sufficient reason for the Board to select CSXT's comparison groups.

B. CSXT's Final Mileage Criteria Are Superior Because They Use Actual Mileage Rather than an Estimate and Avoid Distorting Rounding.

In order to minimize the differences between CSXT's and DuPont's comparison groups, CSXT agreed to the narrow mileage criterion proffered by DuPont, and corrected two errors in DuPont's calculation of the baseline length of the issue movements. *See* CSXT Reply at 19-20. *First*, DuPont continues to use the PC Rail-based estimate of the issue traffic's loaded miles, without providing any explanation of why it ignored the actual loaded miles provided by CSXT more than four months ago in its initial filing. *See* CSXT Answer at 6 (Nov. 19, 2007). The Board specified only nine actual movement characteristics that parties should use as inputs

whether the presence of a fuel surcharge affects the comparability of traffic, not whether or to what extent a given fuel surcharge recovered fuel costs.

¹⁴ Any attempt to conduct such an analysis would be costly, complex, time-consuming, and subject to considerable discretion. As the Board has repeatedly emphasized, its intention and goal is to make Three Benchmark proceedings expeditious, simple, and relatively inexpensive. Application of CSXT's fuel surcharge criterion would serve these goals while simultaneously ensuring selection of more comparable movements than DuPont's standardless approach.

to calculate the “unadjusted” URCS Phase III costs of the issue movements and comparison group movements. *See Simplified Standards* at 25, 84; *see also* Ex Parte 657, *Major Issues in Rail Rate Proceedings* at 48-52, 59-60 (Oct. 30, 2006) (“*Major Issues*”). As the Board explained in *Major Issues*, use of these nine actual “movement-specific operating characteristics” is what allows URCS to generate variable cost figures that approximate the actual variable cost of the “the movement at issue.” *See Major Issues* at 52. One of the nine movement-specific characteristics that must be used to generate unadjusted URCS variable costs that the Board has directed the parties to use in Three Benchmark cases is a movement’s actual “one-way distance” or “loaded miles.” *See Simplified Standards* at 25; *Major Issues* at 52 n 166.¹⁵

For this

¹⁵ As directed, CSXT used actual loaded miles in calculating URCS costs, and for developing its comparison groups.

¹⁶ DuPont also asserted on Reply that, “if CSXT were to change its mileage threshold by just 50 miles . . . 35 movements with R/VC ratios greater than 400% would be eliminated, contrasted with only 11 movements with R/VC ratios below 400%.” DuPont Reply at 17. Based on this claim – that changing CSXT’s mileage factor could generate a comparison group with lower R/VCs – Dupont concluded that “this fact seriously undermines CSXT’s claim” that its mileage

reason alone. DuPont's mileage calculations should be rejected as biased, internally inconsistent, and unreliable.

Second, CSXT applied the plus-or-minus 150 miles band to the issue traffic's loaded miles without DuPont's unnecessary and inappropriate device of "rounding to the nearest 50 miles." *Id.* at 20. DuPont makes no attempt in either its Opening or Reply Evidence to explain why rounding the issue traffic mileage to the nearest 50 miles is reasonable. At best, this practice has no utility. Particularly in the present case, DuPont's rounding significantly distorts the application of the mileage band and the resulting comparison group. For example, by rounding its PC Rail miles for the Pascagoula to Neuse movement to , DuPont would select only movements that ranged from to miles. As a result, it excluded from its final comparison group 18 shipments between and miles that are in CSX I's final comparison group. Including these 18 records, all of which are within miles of even DuPont's underestimate of the issue traffic miles, would have nearly doubled the size of DuPont's comparison group, and significantly impacted its results. Thus, while CSXT accepts, for purpose of this case, DuPont's mileage band, it does not accept DuPont's unexplained, unsupported – and distorting – practice of rounding the length of the issue movements to the nearest 50 miles.

criterion selected comparable movements. *Id.* at 18. DuPont is thus advocating that comparability factors be evaluated based upon the R/VC ratio the selected traffic would generate, rather than upon whether the factor identifies traffic that is actually comparable to the issue traffic. *See id.*; *see also* DuPont Reply, Crowley V.S. at 13 (suggesting, in another context, that R/VC ratios should be a criterion for selecting comparable traffic); n.11, *supra*. Of course, DuPont's remarkable suggestion puts the cart before the horse, because comparison group R/VCs are supposed to be calculated only *after* a comparable group is selected based on relevant comparison factors. R/VC ratios are intended to be the *result* of the process, *not an input*. With respect to the mileage criterion, DuPont's contention was rendered moot by CSXT's acceptance of DuPont's mileage band. Nonetheless, DuPont's argument, and the approach to comparison group selection it suggests, should be rejected as fundamentally at odds with the purpose and intent of the Three Benchmark approach.

Instead of using the issue traffic's actual loaded miles that CSXT provided with its Answer last November, DuPont's Opening and Reply Evidence instead use an inaccurate estimate of the length of the movement generated by PC Rail.¹⁷ Application of the mileage band to an inaccurate estimate of the length of movement results in a less accurate and less reliable indicator of comparability. Together DuPont's use of issue traffic mileage estimates that vary substantially from the actual length of the issue movements, and its compounding error of rounding the (already inaccurate) mileage to the nearest 50 miles make DuPont's mileage criterion substantially inferior to that used by CSXT to select its final comparison groups. The Board should reject DuPont's compound imprecision and adopt CSXT's comparison groups.

C. DuPont's Untimely Density Analysis Does Not Support Its Comparison Group.

For the first time in its Reply, DuPont asks the Board to consider the traffic densities on the line segments used by its comparison group as a selection criterion. *See* DuPont Reply at 20. DuPont's attempt to introduce a new factor for the Board's consideration for the first time in its Reply should be deemed untimely, and not considered by the Board. *See Simplified Standards* at 18 (stating that the Three Benchmark procedures allow both parties to participate in the *winnowing* process) (emphasis added); *see also Duke Energy Corp v CSX Transportation, Inc.*, S T B Docket No. 42070, at 4 (Mar. 21, 2003); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, S T.B. Ex Parte No. 347 (Sub-No. 3) (Mar. 9, 2001). DuPont attempts to excuse the untimely proffering of a new factor by claiming that it did not identify density as a relevant criterion in its case-in-chief "due to the uncertainty of whether [the parties] could use the density maps produced by CSXT in discovery." *See* DuPont

¹⁷ Because DuPont knew the actual loaded miles of the issue movements long before it filed its Opening Evidence, there is no justification for its failure to use that data in its Opening Evidence, or to identify its final comparison group on Reply.

Reply at 20. In fact, however, the Board ruled that the parties could use the density maps prior to the deadline for the parties' opening submissions. *See* S.T.B. Docket No. 42099 *et al*, Decision at 4 (Jan. 31, 2008); *see also* CSXT Opening at 12 n.11. While the timing of the Board's decision left only a limited amount of time to incorporate density arguments into the parties' opening submissions, it is disingenuous for DuPont to claim that it did not know whether it could include the density data in its Opening Evidence. Because both CSXT's density data (produced in mid-December in response to DuPont's discovery requests) and the Board's Order permitting the use of that data were available to DuPont before its opening submission, if DuPont wished to use traffic density as a comparison group selection criterion, it should have included that evidence and argument in its case-in-chief, and not in its Reply Evidence.

Even if the Board were to consider DuPont's untimely proffer of a new comparability factor, DuPont's argument that its comparison group is comparable in density to the issue movement does not undermine the superiority of CSXT's comparison group. As background, DuPont's density analysis involved determining the average density over the routes for the issue traffic and the movements it considered comparable to the issue traffic.¹⁸ Based on those calculations and a comparison of the average density across the comparable movements, DuPont concluded that its comparison group "is comparable in density with each of the issue movements [sic]." DuPont presents three bases for this conclusion:

1. The weighted average density for the issue movement is 35.4 MGT/mile,
2. The simple average density for the comparison group is 49.0 MGT/mile; and
3. The weighted average density for the individual movements in the comparison group range from 33.6 to 91.2 MGT/mile.¹⁹

¹⁸ CSXT notes that DuPont's analysis determined CSXT's density for the routes generated by PC Rail, which may not account for the actual route of movement.

¹⁹ *See* DuPont Reply, Crowley V S. at 18

These observations, if accurate, would provide very little basis to support the conclusion that DuPont's comparison group has "comparable" density to the route traversed by the issue traffic, and no basis whatsoever for the conclusion that DuPont's comparison group is in any sense more comparable to the issue traffic than CSXT's comparison group. First, the average density of DuPont's comparable group is nearly greater than that of the issue route. While, as DuPont points out, both averages fall in the STB track category with the highest density, that category in fact is quite broad, and it encompasses nearly one-half of CSXT's total running track-miles.²⁰ Second, the range of densities in DuPont's comparison group, according to its own analysis, is also quite broad. DuPont's claim that the movements at the high and low ends of the range are also in CSXT's comparison group is not particularly probative in this case, as more than of the moves – in DuPont's comparison group are also in CSXT's comparison group.²¹ As CSXT explained above, however, DuPont's distorted application of the mileage factor alone results in a comparison group that is inferior to CSXT's, regardless of the calculations of average densities across routes traversed by movements in DuPont's comparison group.

D. Other Factors

While the parties dispute the application of other comparison factors, those factors do not ultimately affect the composition of the competing comparison groups. *See* CSXT Reply at 18-19. For example, CSXT maintains that "single-car" shipments (*i.e.*, less than 6 carloads) are more comparable than multiple-car or unit-train shipments to the issue traffic, which was transported in single-car shipments. This factor is moot because DuPont has not included any

²¹ *See* DuPont Reply Exhibit_(TDC-11).

multiple-car shipments in its final comparison group for this case. Similarly, CSXT's exclusion of movements that were originated or terminated by a short-line or switching carrier does not affect the outcome, because DuPont's final comparison group does not include such shipments. Because these comparison factors do not generate differences between the parties' comparison groups, they need not be considered in evaluating which comparison group is superior.

III. THE BOARD SHOULD ACCEPT CSXT'S PROPOSED ADJUSTMENTS TO THE BENCHMARKS, AND REJECT THE RESTRUCTURING OF THE BENCHMARKS PROPOSED BY DUPONT.

A. RSAM Tax Adjustment

In its opening submission, CSXT explained that the Board's current RSAM calculations make an error that adds the calculated shortfall from the Board's revenue adequacy determinations (which are computed on an after-tax basis) to revenues for traffic moving at above 180 percent of variable costs (which are on a pre-tax basis). To correct this indisputable error, CSXT explained that the revenue adequacy shortfall should be adjusted to reflect pre-tax levels and calculated the required adjustment using CSXT's statutory Federal and state income tax rates. The corrected RSAM figures submitted by CSXT are summarized in the table below.

Table 1
Summary of RSAM Corrected To Reflect Proper Treatment of Shortfall Income Taxes

	Board RSAM Mark-up	Board R/VC>180	Shortfall (After-Tax)	Shortfall (Pre-Tax)	Corrected RSAM	RSAM / R/VC>180 Ratio
	(1)	(2)	(3)=(1)-(2)	(4)=(3)/(1- tax rate)	(5)=(2)+(4)	(6)=(5)/(2)
2002	286%	238%	48%			
2003	292%	239%	53%			
2004	292%	231%	61%			
2005	300%	236%	64%			
Average	292%	236%	56%			

On Reply, DuPont does not dispute CSXT's claim that the Board's current RSAM logic incorrectly combines after-tax shortfalls with pre-tax revenues. Instead its witness, Mr. Crowley, describes what he claims are two problems with CSXT's proposed correction.

1. CSXT assumes that the additional revenue from the revenue adequacy shortfall calculation would be taxed at the statutory tax rate; and,
2. That the variable costs used to calculate the RSAM and R/VC>180 ratios are already overstated due to an over recovery of income taxes.

See DuPont Reply at 21. In addition, DuPont asserts that this proceeding is an inappropriate forum for a change to the RSAM calculations. Below, CSXT addresses each of DuPont's arguments

1 CSXT's Correction of the RSAM Properly Used the Statutory Tax Rate.

Mr. Crowley contends that CSXT erred by correcting the RSAM revenue adequacy shortfall to include taxes at the statutory tax rate instead of using CSXT's effective or marginal tax rates. Although he would prefer to use the marginal tax rate, which he describes as "the tax rate that applies to the last dollar of the tax base," he explains that marginal tax rate is difficult to determine and cannot be computed from the record in this proceeding. He then defaults to the "effective tax rate" as the purportedly appropriate rate to apply to make the correction.

Mr. Crowley is wrong to assert that either an effective or marginal tax rate should be used to correct the RSAM revenue adequacy shortfall for taxes. All incremental taxable income earned by CSXT incurs incremental tax at the statutory tax rate and any revenue required to offset the revenue adequacy shortfall is no exception. While it is true that the amount of cash CSXT actually pays in Federal and state income taxes in any one year could be influenced by tax-loss carryforwards and carrybacks, and by deductions that generate deferred taxes, these merely represent differences in the timing of when CSXT actually makes the tax payments.

CSXT still incurs tax liability at the statutory rates. While CSX I² had net operating loss carryforwards during these periods, all of these losses were usable by CSXT on its income earned in this or subsequent periods. Thus, additional revenue to cover the revenue adequacy shortfall would not be offset by net operating losses that would have otherwise been unavailable to CSXT. Similarly, government tax credits might reduce the cash tax in a year, however, there would be no additional tax credits generated as a product of the additional incremental income. As such, the proper assumption is that the incremental tax liability that CSXT would incur for the income attributable to offset the revenue adequacy shortfall should be measured at the statutory rate. In addition, because the Board's RSAM calculations assume that the revenues for traffic moving above 180 percent of variable costs would increase to levels required to eliminate the revenue adequacy shortfall with no corresponding increase in capital or operating cost expenditures, the added revenues would generate no new tax deductions, which further confirms that the statutory tax rate is the appropriate rate to use to correct the RSAM calculations.

Use of the statutory tax rate is also supported by the Board's general purpose costing procedures for railroads. Specifically, the Board's Uniform Rail Costing System (URCS) develops costs attributable to the payment of Federal income taxes using the statutory tax rate

2 DuPont's Criticism of URCS Does Not Undermine the Demonstrated Need for Correction to the RSAM Calculation

Mr. Crowley argues that URCS' use of the statutory federal tax rate to add income-tax-related variable costs to individual movements provides for more taxes than CSXT actually pays on a cash basis. He suggests that by overstating the income tax burden, URCS improperly reduces the number of movements in the Board's carload waybill sample with revenue to variable cost ratios in excess of 180 percent, thus suppressing the number of

movements from which the revenue adequacy shortfall can be recovered, and, he claims, artificially inflating the RSAM. Although he quantifies the effects of his alleged overestimate of income taxes in URCS for the year 2005, he does not restate the Waybill Sample variable costs for 2002 through 2005 using the effective tax rate.²² This is a fatal flaw in Mr. Crowley's analysis, because appropriate, corresponding recalculation of costs would lower URCS variable costs and increase the R/VC ratios for the comparable traffic group under the Board's three benchmark methodology. If such a consistent adjustment were made, any overstatement in the calculated RSAM produced by the differential between URCS use of statutory Federal income tax rates and the CSXT effective tax rate would be offset by the corresponding increase in R/VC ratios for the comparable traffic (as a result of the substitution of the effective tax rate to URCS cost calculations).

3. *It is Entirely Appropriate to Correct the Erroneous RSAM Calculation in This Proceeding*

In its argument, DuPont erroneously suggests that the Board's current RSAM calculation, which was announced by the Board in its September 2007 decision in *Simplified Standards*, was subject to four rounds of comments and a public hearing. In fact, because it was included as part of the Board's final decision in that proceeding, the specific RSAM formulation adopted by the Board was not subject to public comments. More important, the Board did not issue its actual calculation of the new RSAM until December 11, 2007, and corrected that calculation on December 20, 2007. See Notice, STB Ex Parte 347 (Sub-No. 2) (Dec. 11, 2007);

²² The URCS adjustment advocated by DuPont is also contrary to the Board's rule that it will not consider such adjustments in these cases. See *Simplified Standards* at 22, 84. Moreover, the Board has made clear that it will not consider criticisms of URCS or proposed changes to URCS in a Three Benchmark case. In its *Major Issues* Decision which the Board adopted by reference in *Simplified Standards*, it made clear that "if a party believes that URCS could be improved . . . it may request a *separate rulemaking*," and that, "in an individual rate reasonableness proceeding, [the Board] will use [its] existing URCS model, without further movement-specific adjustment." *Major Issues* at 61 (emphasis added).

See Notice, STB Ex Parte 347 (Sub-No. 2) (Dec 20, 2007).

Moreover, regardless of when the RSAM was developed by the Board, it is the Board's standard practice to correct obvious errors in its Decisions. *See, e.g., Western Fuels Ass'n, Inc. v. BNSF Rwy Co*, STB Dkt. No. 42088, slip op. at 10 (served Feb. 28, 2008) (ordering parties to correct technical errors when filing their supplemental evidence); *Otter Tail Power Co v BNSF Rwy Co*, STB Dkt. No. , slip op. at 2 (served May 26, 2006) (reopening, *sua sponte*, the proceeding to correct a technical error).²³

B. The Board Should Reject the Retroactive Changes to the RSAM Proposed by DuPont.

DuPont's proposed restructuring of RSAM methodology is untimely, unworkable in practice, and contrary to law. *First*, DuPont's proposal to restructure the RSAM by applying a so-called "efficiency adjustment" is based on erroneous assumptions, would not achieve its stated objective, and has been flatly and unequivocally rejected by the Board on several occasions. *See* CSX'I Reply at 25-27; *id.* at Exhibit 4 (V.S. Fisher). As the Board summarized in a *Simplified Guidelines* decision:

The amount of revenue shortfall attributed to traffic with an R/VC ratio below 100% cannot provide any reasonable approximation or useful surrogate for other inefficiencies in a carrier's system. And

²³ CSXT's proposal simply seeks to correct an inadvertent error in the calculation of the RSAM, which implement the Board's intent in Ex Parte 646. DuPont's CAPM proposal, in contrast, would make wholesale organic changes to the RSAM. *See* CSXT Reply at 25 n.19.

while specific inefficiencies can be brought to light in a SAC analysis under the *Coal Rate Guidelines*, any attempt to measure carrier-specific inefficiencies under the simplified guidelines would add undue cost and complexity to an inquiry that must necessarily sacrifice some precision to achieve simplicity.

B P Amoco Chem. Co. v. Norfolk So. Ry Co , STB Docket No. 42093, Decision at 9-10 (June 6, 2005). Moreover, as the Board explained in its recent decision rejecting the same proposal in the *Simplified Standards* proceeding. DuPont's argument is untimely and is therefore barred as a matter of law. *See Simplified Standards*, STB Ex Parte No. 646 (Sub-No 1) Decision at 12-13 (served March 19, 2008) (denying motion for reconsideration of elimination of same efficiency adjustment for failure to raise it during the notice-and-comment period in the rulemaking proceeding).

Second. DuPont's proposal to revise the RSAM retroactively by inserting a new model for calculating the cost of capital is inconsistent with due process and the rules the Board has adopted to govern these proceedings, procedurally improper, and would inject substantial additional complexity, expense, and potential delay to these proceedings. *See CSXT Reply* at 28-37. The general rule is that agencies may not apply new rules – like the Board's recent adoption of the new "CAPM" model for determining carriers' cost of equity – retroactively. *See CSXT Reply* at 25-28. DuPont has offered no reason for the Board to make an exception to this rule in order to apply a new cost of capital model (adopted *after* the Board issued its final *Simplified Guidelines* rules) retroactively to these cases. Further, the forum in which to consider such a significant change, with broad implications for all Class I rail carriers and their customers, is a notice-and-comment rulemaking that affords all interested parties an opportunity for input,

not in this individual adjudication involving only one carrier and one shipper. *See id.* at 28-30.²⁴

Finally, because analytical consistency would require the Board to change a number of other parameters, benchmarks, and calculations if it changed the cost of capital calculation (and very well might require the parties to submit additional evidence), DuPont's proposed retroactive change would add considerable complexity, disputes, expense, and potential delay to these simplified proceedings, thereby thwarting a fundamental goal of the Three Benchmark approach. *See id.* at 30-35. DuPont's proposed revamping of the RSAM to make far-reaching retroactive changes is unwise, unfair, untimely, and unlawful, and therefore should be rejected.

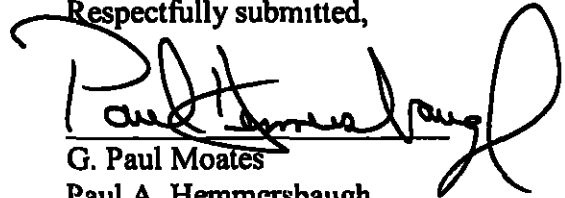
²⁴ In challenging CSXT's request that the Board correct what is essentially an arithmetic error in its RSAM calculation, DuPont argues that the Board should not make such an adjustment "within the narrow confines of this proceeding," but should instead only consider it in a notice and comment proceeding. *See* DuPont Reply at 24. As CSXT explained above, it seeks only a technical correction to the RSAM calculations to effectuate the Board's intent, while DuPont seeks a fundamental substantive change to a key component of the RSAM, and seeks to make that change retroactive to 2002. If DuPont thinks an unintentional arithmetic error can only be corrected in a formal rulemaking (a notion that CSXT rejects), then certainly it must concede that the broad substantive change it seeks should only be considered in such a rulemaking.

CONCLUSION

The Board should adopt CSXT's evidence in its entirety, and find that the challenged rate does not exceed a maximum reasonable level.

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Dated: April 4, 2008

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC)

Defendant.)

Docket No. NOR 42101

**REBUTTAL VERIFIED STATEMENT OF BENTON V. FISHER
CSX TRANSPORTATION, INC.**

I. Introduction

1. My name is Benton V. Fisher. I am a Senior Managing Director at FTI Consulting in Washington, DC, and am the same Benton V. Fisher who filed a verified statement accompanying CSXT's Reply Evidence in this proceeding and also sponsored portions of CSXT's Opening and Reply Evidence in this proceeding. I am also sponsoring portions of the testimony presented in Sections II and III of the foregoing Rebuttal Evidence of CSX Transportation, Inc. My qualifications and prior testimony were attached as Exhibit BVF-1 to my Reply Verified Statement.

2. I have been asked by CSXT to respond to portions of DuPont's reply submission in this proceeding and, in particular, the claim that DuPont could neither ascertain CSXT's reporting of fuel surcharges in the Waybill Sample records provided in this case nor confirm CSXT's use of information in the Waybill Samples and in the public domain to apply its selection criterion and include in its comparison groups only CSXT movements that had a fuel surcharge.

II. CSXT Waybill Samples and Miscellaneous Charges Field

3 In November and December 2007, the Board released CSXT's 2001-2005 Waybill Sample files to the parties for use in identifying movements that are potentially comparable to the issue traffic in each of DuPont's three complaints.¹ Each of those files contained "Revenue" fields – including both expanded and unexpanded figures² – and a "Miscellaneous Charges" field. Also in December 2007, the Board released a decision in Ex Parte No. 347 (Sub-No.2) in which it presented its RSAM calculations for 2002-2005. In that decision, the Board indicated that it had included the amounts reported as Miscellaneous Charges, in order to capture fuel surcharges. Either party had the ability to review the amounts reported in the Waybill Sample records and verify whether the Miscellaneous Charges field represented CSXT's surcharge, based on information in the Waybill Sample and public domain.

III. CSXT's Comparison Groups

4. For CSXT's initial tender of a comparison group submitted with its Opening Evidence, CSXT explained that it limited comparable traffic to movements to which a fuel surcharge applied by selecting only those Waybill Sample records that had amounts reported in the Miscellaneous Charges field. *See* CSXT Opening Evid. at 14. In its Reply filing, CSXT modified certain criteria in response to DuPont's evidence, and continued to

¹ STB Docket Nos. 42099, 42100, and 42101

² The term "expanded" in this context relates to the fact that each Waybill Sample record is, as its name suggests, drawn from a sample and thus representative of more than one shipment record. As records of single-car shipments like the traffic at issue in this proceeding are generally sampled at a 2.5% rate, each sampled record represents 40 carloads. Thus, most of the single-car shipments in the Waybill Sample are associated with 1 actual carload that, when adjusted by the sampling ratio, is reported as 40 expanded carloads. The expansion factor is also applied similarly to other figures (e.g., revenues, variable costs) and the resulting fields accordingly identified as "Expanded."

require that its comparable traffic include only movements with a fuel surcharge, which it continued to identify based on the Miscellaneous Charges amounts reported in the Waybill Sample records.

IV. Fuel Surcharge Validation

5. In response to DuPont's claim that there was no "link" between the Miscellaneous Charges field and the CSXT fuel surcharge, I reviewed the records that CSXT included in its Final Comparison Group. In order to confirm that the existence of a fuel surcharge could be readily discerned for individual Waybill Sample records, I performed the following series of steps for each record in CSXT's group

- a. I calculated the Revenue per carload based on the Expanded Revenues and Expansion Factor reported for the Waybill Sample record;
- b. I calculated the ratio of the Miscellaneous Charges³ to the Revenues based on the Miscellaneous Charges reported for the Waybill Sample record and the Revenue figure calculated in Step a. above; and
- c. I determined the CSXT fuel surcharge from information on CSXT's public website for the waybill date reported for the Waybill Sample record

6.

³ Because the Miscellaneous Charges and other amounts are reported in total for the waybill, waybills covering more than one carload would require a separate adjustment for comparison on a per-carload basis. CSXT's comparison group in this case, however, is comprised entirely by waybill records with only one carload, indicating that the Miscellaneous Charges reported on the Waybill Sample record are on a "per-carload" basis consistent with the unexpanded Revenues calculated in Step a.

⁴ This example is the first record listed in CSXT's comparison group included in Exhibit 1 to the Reply evidence.

REDACTED

REDACTED

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on April 3, 2008

Benton V. Fisher

Benton V. Fisher

EXHIBIT 2

Exhibit 2 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.


EXHIBIT 3

Exhibit 3 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of April, 2008, I served a copy of the foregoing by courier and by first class mail, postage prepaid on the following:

Nicholas J DiMichael
Jeffrey O Moreno
Thompson Hine LLP
1920 N St . NW
Suite 800
Washington, DC 20036



Matthew Wolfe